(3)

IN THE HON'BLE HIGH COURT OF JUDICATURE AT BILASPUR

Cr.A.No.: 1006 / 2001 **D.B.**

Appellant :- **Tularam s/o Bhookaoo ram Yadav**

(In jail) **aged –50 yrs. R/o Rawan P.S. Balodabajar**

distt- Raipur

V/s

Respondent :- State of Chattisgarh

MEMO OF APPEAL UNDER SECTION 374 OF CODE OF CRLPRO. CODE .

(5)

(26)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr.Appeal No.1006/2001

Tularam

Vs.

State of Chhattisgarh

Shri Abhay Tiwari, Counsel for the appellant.

Shri U. N. S. Deo, G.A. for the State.

J U D G M E N T

(*21*.11.2005)

The following Judgment of the Court was delivered by **Dilip Raosaheb Deshmukh, J.**

This appeal is directed against the judgment dated 27.09.2001 delivered by Shri B.L.Tidke, 2nd Additional Sessions Judge, Baloda Bazar, District Raipur, in Sessions trial No.99/2001 whereby the appellant was convicted under Section 376 (1) for committing rape on Trilochani Bai, a mentally retarded girl, aged about 18 years on 26.11.2000 and was sentenced to rigorous imprisonment for 7 years and a fine of Rs.500/-, in default of which, to further undergo R.I. for 6 months.

2. Briefly stated the prosecution story is that Trilochani Bai P.W.5, daughter of Mehatru P.W.1 and Bhagmati P.W.2, is a mentally retarded girl. Dhaneshwari P.W.3 and Mamta P.W.6 are the playmates of Trilochani. On 26.11.2000 Trilochani had gone to the plant area for plucking mushrooms. Mamta P.W.6 and Dhaneshwari P.W.3 had also gone to pluck the mushroom in the plant. The appellant finding Trilochani alone committed rape on her. Mamta P.W.6 and Dhaneshwari P.W.3 while returning from the plant saw the appellant committing sexual intercourse with

Trilochani and informed Tikeshwari Bai P.W.4, the daughter-in-law of Bhagmati about the incident. Tikeshwari Bai informed Bhagmati who in turn informed her husband Mehatru. Mehatru lodged F.I.R. in P.S. Baloda Bazar on the same day at 09.30 P.M. Trilochani was medically examined by Dr. Mrs. N. Bajpai P.W.8 who found that she was a mentally retarded person due to an injury to brain during birth. There was generalized inflammation and congestion all over the private parts. Hymen had more than three weeks old scar of laceration. Superficial ill-defined laceration of posterio-lateral part of introitous was seen. White discharge was present on vulva. Vagina admitted one finger with difficulty. Dr. N. Bajpai opined that Trilochani Bai might have undergone act of intercourse for the first time in her life before more than 3 weeks and injuries on her private part could be due to the act of intercourse committed within 24 to 48 hours. The age of Trilochani Bai was opined to be between 16 ½ to 18 years. The appellant was also sent for medical examination. Dr. P.K.Tiwari P.W.10 on examination found that accused-appellant was capable of performing sexual intercourse. There were no injuries over penis. Smegma was present. After completion of investigation, the appellant was prosecuted under Section 376(1) I.P.C.

3. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 12 witnesses. The trial Court relying on the prosecution evidence convicted the accused-appellant under Section 376 (1) of the I.P.C. and awarded sentence as aforesaid in paragraph 1.

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4. Shri Abhay Tiwari, learned counsel for the appellant has contended that the prosecution has failed to establish the charge under Section 376 (1) I.P.C. against the appellant since the age of prosecutrix-Trilochani is shown to be above 16 years and the evidence of Dhaneshwari P.W.3, Mamta P.W.3 and Trilochani (Prosecutrix) P.W.5 goes to show that the prosecutrix Trilochani Bai was a consenting party in the sexual intercourse. On the other hand, Shri U.N.S.Deo, learned counsel for the State has argued in support of the impugned judgment while contending that the medical evidence of Dr. Mrs. N. Bajpai P.W.8 as well as the demeanor of Trilochani Bai P.W.5 recorded by the trial Court coupled with the evidence of parents i.e. Mehatru P.W.1 and Smt. Bhagmati P.W.2 established beyond doubt that Trilochani was, at the time of occurrence a mentally retarded girl. Under clause '*Fifthly*' of Section 375 I.P.C., consent of the prosecutrix in the sexual intercourse committed by the appellant is wholly irrelevant since the prosecution has established beyond doubt that by reason of unsoundness of mind she was unable to understand the nature and consequences of the sexual act to which she might have given consent.

5. I have heard rival contentions and have also perused the record of sessions trial No.99/2001. Mehatru P.W.1 and Smt. Bhagmati P.W.2 have testified that their daughter Trilochani is a mentally retarded person. Tikeshwari (P.W.4) also corroborates the above fact. Dr. Mrs. N. Bajpai P.W.8 has also stated that upon examination she found that Trilochani was a mentally retarded girl possibly due to an injury to the brain at the time of birth. This

evidence is wholly unrebutted in cross-examination. In cross-examination para 6 of Dhaneshwari P.W.3, a specific defence was taken that Trilochani was a mentally retarded person. Besides, the learned trial Judge has very succinctly noted the demeanor of Trilochani Bai at the time of evidence which shows beyond doubt that Trilochani was a mentally retarded girl on the date of occurrence.

6. Section 375 of the I.P.C. which defines rape is as follows:

> **375. Rape.**--- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--
>
> *First.*--- Against her will.
>
> *Secondly.*--- Without her consent.
>
> *Thirdly.*--- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
>
> *Fourthly.*--- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> *Fifthly.*--- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> *Sixthly.*--- With or without her consent, when she is under sixteen years of age.
>
> *Explanation.*--- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> *Exception.*--- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Dr. Mrs. N.Bajpai P.W.8 has testified that the age of the prosecutrix on the date of examination was between 16 ½ to 18 years. However, Clause *'fifthly'* of Section 375 clearly shows that consent of the prosecutrix in the sexual intercourse would be wholly immaterial where the prosecutrix is unable to understand the nature and consequences of the sexual act due to unsoundness of mind. In view of the unsoundness of mind or mental retardedness of Trilochani Bai, her consent, if any, in the sexual act committed by the appellant would be wholly immaterial and the offence of rape under Section 376(1) I.P.C. would be established where the prosecution evidence establishes that the accused-appellant committed sexual intercourse with Trilochani Bai P.W.5, a mentally retarded girl, on 26.11.2000.

7. Overwhelming evidence has been adduced by the prosecution which establishes beyond doubt the prosecution story of sexual intercourse by the appellant with Trilochani P.W.5. Trilochani has in para 1 of her testimony stated that the accused made her to lie down on the grass and removing her underwear slept on her which caused pain on her private parts. In cross-examination, a suggestion was given by the defence that the under garments of Trilochani had got stained with blood. The testimony of Dr. Smt. N. Bajpai clearly shows that on the vagina of Trilochani Bai P.W.5 there was a superficial ill-defined lacerated wound and the vagina admitted one finger with difficulty. There is absolutely nothing in her testimony which would go to suggest that Trilochani Bai was menstruating at the time of occurrence. She has clearly opined that the injuries on the genitalia of Trilochani Bai could be

caused due to act of sexual intercourse. The above testimony further finds fullest corroboration from Dhaneshwari P.W.3 who has given a vivid description of penetration during the sexual intercourse committed by the appellant with Trilochani. The unrebutted testimony of Mamta P.W.6 who also saw the sexual intercourse committed by the appellant on Trilochani fully corroborates the prosecutrix.

8. The above mentioned wholly unrebutted evidence led by prosecution clearly establishes beyond all reasonable doubt that on 26.11.2000 the appellant had committed sexual intercourse with a mentally retarded girl Trilochani Bai, aged between 16 ½ to 18 years. The sexual intercourse thus committed by the appellant with a mentally retarded girl brings the offence within the ambit of explanation *'fifthly'* to Section 375 I.P.C. and thus constitutes the offence of rape under Section 376 (1) of the I.P.C.

9. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the trial Judge has rightly convicted the appellant under Section 376 (1) of the I.P.C. So far as the sentence awarded by the trial Judge is concerned, it is appropriate and does not call for interference. The appeal is thus devoid of substance, fails and is hereby dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani